In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1282

GEORGE J. FULTON,
Petitioner,

vs.

ISADORE HECHT, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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RESPONDENTS' RE-STATEMENT OF THE CASE

Petitioner's statement of the case is not a statement of the case but is basically an argument. The collateral matters so advanced violate the express admonitions of Rule 23.4 of this Court.

The decision of the Fifth Circuit sought to be reviewed, *Fulton* v. *Hecht*, (CCA 5 1977) 545 F.2d 540, clearly sets forth the history of the case, the issues and the facts.

However, Petitioner's argumentative statement of the case dictates a restatement in order to answer the arguments advanced ad seriatim.

First is the contention that:

> "* * * Fulton alleged and proved that the State of Florida is a partner or joint venturer in the operation of Flagler or, alternatively, that Flagler is a revenue generating agency of the state operated for it by the Respondents."

The above statement is contrary to the findings of both lower courts. The record clearly establishes that the State of Florida exercises no control over the operation or management of the track. Flagler as a privately owned operation pays all of the expenses, establishes its own policies, determines the services to be afforded its patrons and the types and classes of races to be run.

The State of Florida participates in the pari-mutuel pool to the degree provided for by statute, but it is not required to share in any losses. Mutuality of control and an agreement for the sharing of losses are essential to the existence of a joint venture or partnership. *Livingston* v. *Twyman,* (Fla. 1950) 43 So.2d 354, *Kislak* v. *Kreedian,* (Fla. 1957) 95 So.2d 510.

The supervision and regulation by the State of Florida has but one objective to oversee, check and audit the pari-mutuel handle to insure that the state received its prescribed share. The remaining regulations are designed to maintain the public confidence in the integrity of dog racing.

The next contention for the existence of a partnership is based upon the testimony of the Chairman of the Board of Business Regulations that he had upon occasion referred to the pari-mutuel tracks in Florida as a partnership. Reliance is then placed upon the testimony of a state economist to the effect that legislators, members of the executive department and others used the term partnership in discussing the relationship between the pari-mutuel tracks and the State. This same witness also testified that he did *not* share that view.

Petitioner then relies upon the opinion of the Supreme Court of Florida in *Wilson* v. *Sandstrom,* (Fla.) 317 So.2d 732, 741, *Cert. Denied,* (1975) 423 U.S. 1053 as amounting to an adjudication that the State and the pari-mutuel tracks are partners or joint venturers. This simply is not the case as an examination of that opinion will readily disclose. The dog track and the State are no more partners or joint venturers than a gambling house operator running a poker game is a partner or joint adventurer with his patrons when he cuts the pot.

Petitioner then complains that the State refused to follow its so-called 15 day rule, which requires the giving of 15 days notice to it permittees or licensees of cancellation of their license. The rule obviously applies only to the holders of licenses from the State to operate a pari-mutuel establishment. It does not apply to kennel owners or to private contracts.

Furthermore the Division Director of the Department of Business Regulations testified that the rule was applicable only when great harm would result to the public welfare. He was also of the opinion that the unilateral refusal by West Flagler to rebook Fulton did not violate the rule because the State had no interest in whether Fulton was running his dogs at Flagler or not.

The gravamen of Fulton's complaint is Flagler's election not to renew his booking contract. The lower courts found and it is conceded that the State exercises no supervision, authority or control over such contracts. The "State Action" doctrine has no application, absent control and

authority over the subject matter of the complaint. See: 14 *C.J.S.*, (Civil Rights) Supp. 193, 195, Sections 115, 117 and authorities cited. *Greco* v. *Orange Memorial Hospital Corporation, et al.*, (CCA 5 1975) 513 F.2d 873, *Cert. Denied*, (1975) 423 U.S. 1000.

The opinion of the Fifth Circuit sought to be reviewed clearly and succinctly states the facts and the issue. The Court said (text 541):

> "The thrust of Fulton's §1983 claim is that West Flagler's failure to renew his contract to race his greyhounds at the Flagler Kennel Club track was done under color of state law. He also claims this refusal denied him equal protection of the laws. The Flagler Kennel Club is admittedly a private operation. As such, the proof must show significant state involvement in order to bring an otherwise private concern within the ambit of the Fourteenth Amendment. *Moose Lodge No. 107* v. *Irvis*, 1972, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627; *Greco* v. *Orange Memorial Hospital Corp.*, 5 Cir., 1975, 513 F.2d 873, *cert. denied*, 1975, 423 U.S. 1000, 96 S.Ct. 433, 46 L.Ed.2d 376, See also *Burton* v. *Wilmington Parking Authority*, 1961, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45; *Shelley* v. *Kraemer*, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161."

The Court of Appeals in its opinion (text 543) expressly held that the State does not regulate the booking contracts between the kennel club and the dog owners. This is admitted by Petitioner.[1]

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1. In their brief in the anti-trust aspect of this case still pending in the court below *Fulton* v. *Hecht*, (CCA 5) Case No. 76-2391 petitioners say:

> "Except for licensing dog owners, the Florida Board of Business Regulation does not regulate the booking system."

REASONS FOR DENYING THE PETITION

Without diminishing the importance of any appellate decision involving constitutional or alleged constitutional rights, the court below did no more than follow the instructions of this Court in *Burton* v. *Wilmington Parking Authority* (1961) 365 U.S. 715, *Moose Lodge No. 107* v. *Irvis*, (1972) 407 U.S. 163, and *Jackson* v. *Metropolitan Edison Co.*, (1974) 419 U.S. 345, by sifting the undisputed facts and weighing the circumstances from which it reached the unanimous legal and factual conclusion that the required significant involvement with discrimination on the part of the state was lacking. *Reitman* v. *Mulkey*, (1967) 387 U.S. 369.

Flagler's decision not to renew Fulton's booking contract, can hardly be said to constitute a question of particular gravity or general importance, so as to justify the issuance of the writ. *Rudolph* v. *U. S.*, (1962) 370 U.S. 269.

In quoting from *Burton* v. *Wilmington Parking Authority*, (1961) 365 U.S. 715 at 723 the Fifth Circuit in affirming the District Court in the instant case said:

> "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." 365 U.S. at 722, 81 S.Ct. at 860.

Following the above quotation the court continued:

> *"The Challenged Activity*
>
> The trial court found that the State of Florida was not sufficiently connected with West Flagler's refusal to renew Fulton's booking contract so as to imbue that act with the attributes of the State."

The Court of Appeals on the record reached the same conclusion and unanimously affirmed. Under such circumstances this court will not review by certiorari the findings and decisions of the lower courts. *Golden State Bottling Co., Inc.* v. *N.L.R.B.*, (1973) 414 U.S. 871, *U. S.* v. *Durham Lumber Co.*, (1960) 363 U.S. 522.

Denial of certiorari by this court in other cases on the same issue under like circumstances dictates a like denial in the instant case.

In *Golden* v. *Biscayne Bay Yacht Club et al.*, (CCA 5 1976) 530 F.2d 16 one black and one member of the Jewish religion brought a civil rights action against the private yacht club which held a lease from the City for use of bay bottom lands on which the club docks were constructed. Their complaint was that they were excluded from membership because of their color or religion. The District Court ordered the club to stop barring applicants for membership upon the grounds stated. The Court of Appeals affirmed 521 F.2d 344. On rehearing en banc the Court of Appeals reversed. Five circuit judges dissented.

The plaintiffs filed a petition for certiorari to this court. That petition was denied (November 1976) ..... U.S. ....., 50 L.Ed.2d 152.

The *Golden* case presented more compelling features for the granting of the petition than are present in the instant case. (1) five judges dissented, (2) the case had racial and religious overtones, and (3) public lands under lease were involved. None of these elements are present in the instant case.

In *Greco* v. *Orange Memorial Hospital Corporation, et al.*, (CCA 5 1975) 513 F.2d 873 which is closely in point the Court likewise found State action to be lacking. This Court there denied certiorari. (1975) 423 U.S. 1000.

THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISIONS RELIED UPON BY THE PETITIONER

Petitioner grounds its petition upon the contention that the decision of the Court of Appeals conflicts with this Court's decisions in *Burton* v. *Wilmington Parking Authority*, (1961) 365 U.S. 715 and *Evans* v. *Newton*, (1966) 382 U.S. 296. It is also contended that the decision conflicts with *Ihrke* v. *Northern States Power Company*, (CCA 8 1972) 459 F.2d 566 and *Hollenbaugh* v. *Carnegie Free Library*, (CCA 3 1976) 545 F.2d 382.

It is then asserted that the instant case presents an important question as to the applicability of 42 *U.S.C.* §1983 to white persons "who have been subjected to state approved discrimination".

There is no State approved discrimination anywhere involved in Flagler's refusal to renew Petitioner's booking contract. Both lower courts so found and Petitioner in its anti-trust brief admits that the State does not undertake to regulate the booking contracts.[2] It was simply a private decision by a private corporation in a private matter wholly unconnected with any concept of State action.

In affirming the District Court's finding that no State action existed the Fifth Circuit in the instant case discussed *Jackson* v. *Metropolitan Edison Co.*, (1974) 419 U.S. 345 as well as the *Burton* case, saying:

> "In *Jackson* v. *Metropolitan Edison Co.*, *supra*, in speaking of public utility regulation, the Supreme Court said that '[t]he mere fact that a business is subject to state regulation does not by itself convert its ac-

2. Footnote one, *supra*.

tion into that of the State for purposes of the Fourteenth Amendment.' *Id.* 419 U.S. at 350, 95 S.Ct. at 453. The Court further said that even extensive or detailed regulation, by itself, would not be sufficient to tip the scales. The Court, in *Jackson,* recognized that public utilities would likely be subject to extensive regulation, but it refused to acknowledge such regulation as the single decisive factor for finding the utility to be the state itself. We think the dog racing industry can be analogized to the public utility situation. Because of the very nature of the industry, it must be regulated to protect the public. Even though the regulation might be extensive, it cannot, in any *realistic sense,* make the State a partner in the endeavors of the Kennel Club.

> The 'symbiotic relationship' that was characterized in *Burton* v. *Wilmington Parking Authority, supra,* is not present here. The Kennel Club is not a lessee of public property. There is no evidence of a physical relationship. The State is not obligated to maintain and repair the Kennel Club's premises."

With respect to *Burton,* the Petitioner then juxtaposes the language in *Burton* with what it considers to be "* * * an appropriate description of the instant facts * * *". This transposition is easily accomplished with any case when you start with a false premise. Petitioner in advancing this comparison says "* * * but no state may effectively abdicate its responsibilities by ignoring them or merely failing to discharge them whatever the motive may be." Petitioner assumes as its false premise, without proof, that the State had some responsibility or duty imposed by law with respect to the booking contracts. The record is wholly to the contrary as both lower courts so found.

With respect to *Jackson* which was subsequent to *Burton* the Court said:

> "*Jackson* v. *Metropolitan Edison Co., supra,* 419 U.S. at 351, 95 S.Ct. at 453. Our inquiry must go a step further and determine if there is a 'sufficient close [connection] between the State and the challenged action . . . so that the action of the [business entity] may be fairly treated as that of the State itself.' *Id.* See also *Moose Lodge No. 107, supra,* 407 U.S. at 176, 92 S.Ct. 1965.
>
> The challenged activity here is the refusal to renew Fulton's booking contract to race greyhounds at Flagler Kennel Club. We fail to find that 'necessary' sufficiently close connection between this act and the State so as to treat it as the act of the State. The evidence is that the State of Florida—except for the requirement that a dog racer must have a state license to run his dogs—does not regulate booking contracts between the Kennel Club and the dog owners. In fact, the State has no control over the contract. Fulton has not shown that the State either directly or indirectly participated in the decision not to renew his contract. See *Greco* v. *Orange Memorial Hospital Corp., supra.*"

Evans v. *Newton,* (1966) 382 U.S. 296, is no wise in point. It was there held that a public park devised by Will to the City of Macon upon condition that it only be used by whites and managed by white trustees could not be so restricted. The court held that the property had to be treated as a public institution and it was improper to exclude blacks from the use of the park under the Fourteenth Amendment.

Justice Black dissented upon the ground that no error was committed under Georgia law in accepting the City's resignation as trustee and appointing a successor trustee. He also was of the view that the writ was improvidently granted in the first instance. Justices Harlan and Stewart agreed with Black, J., saying:

> "In my view the writ should be dismissed as improvidently granted because the far-reaching constitutional question tendered is not presented by this record with sufficient clarity to require or justify its adjudication, assuming that the question is presented at all."

Ihrke v. *Northern States Power Company,* (8th Cir. 1972) 459 F.2d 566, has no bearing on the instant case because there the Court of Appeals in reversing simply held that the complaint stated a cause of action. That case challenged the constitutionality of regulations promulgated by the utility relating to the termination of service. It was claimed that the service had been terminated without notice and without a hearing.

A decision on the merits after a trial, as in the case at bar, is a far cry from a decision simply holding that the complaint failed to state a cause of action.

Petitioner further admits that the opinion and decision in the *Ihrke* case was vacated as moot (1972) 409 U.S. 815. This Court in vacating the opinion of the Eighth Circuit said "* * * judgment vacated and the case remanded to the Court of Appeals with instructions to dismiss the case as moot."

In face of the instruction to dismiss the case it is difficult to see upon what basis Petitioner can now cite the decision for a claimed conflict. Reliance upon the *Ihrke* decision can only be classified as an academic exercise and it is not the function of this Court on certiorari to decide academic questions.

Lastly Petitioner for a claimed conflict relies upon *Hollenbaugh* v. *Carnegie Free Library,* (CCA 3 1976) 545 F.2d 382. By no stretch of the imagination can the instant case be considered as being in conflict with *Hollenbaugh.* The opinion shows that the library received approximately 90% of its financial support from local municipalities, school districts and the Commonwealth of Pennsylvania. It was governed by 24 trustees, 15 of whom would be appointed by local government concurrent with their terms of office in the appointing local government bodies. The District Court there found as a matter of law that the requisite State involvement was lacking and entered summary judgment without ever reaching the merits of the complaint. The Third Circuit in reversing simply held that the nexus test was one of degree and "* * * within the confines of certain guidelines the presence or absence of state action must be determined on a case by case basis".

The decision of the Fifth Circuit Court of Appeals in the instant case affirming the findings of fact and conclusions of law made by the District Court is well within the judicial guidelines for a decision of such issues as expressed in the decisions of this Court.

THE DECISION BELOW REPRESENTS NEITHER IMPORTANT NOR UNIQUE CONSTITUTIONAL ISSUES

The decision below is important only to the litigants involved. The petition is but an attempt to extend federal jurisdiction over private contracts between private parties unconnected with any State regulation of such contracts. Such efforts do not create or give birth to an "important" constitutional issue.

The Director of Business Regulations testified that the State of Florida had no interest one way or the other in whether or not Fulton had a booking contract or raced his dogs at Flagler. The refusal of Flagler to renew Fulton's booking contract cannot be characterized as presenting special or important issues of constitutional law so as to warrant the granting of a petition for certiorari on the basis of a claimed conflict.

CONCLUSION

For the reasons set forth above the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that two (2) copies of the foregoing printed Respondents' Brief in Opposition to Petition for Writ of Certiorari to United States Court of Appeals, Fifth Circuit were mailed to Sinclair, Louis & Segal, 1600 duPont Building, Miami, Florida 33131, and J. Vogelson, Esq., 2200 Fidelity Union Tower, Dallas, Texas 75201, Attorneys for Petitioner this ..... day of April, 1977.

HERBERT L. NADEAU